No. 89-783

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE INDEPENDENT FEDERATION
OF FLIGHT ATTENDANTS,

Petitioner,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MURRAY GARTNER
(Counsel of Record)
PROSKAUER ROSE GOETZ
& MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 909-7000

PAUL E. DONNELLY
STINSON MAG & FIZZELL
920 Main Street
Kansas City, Missouri 64105

MARK A. BUCKSTEIN
MICHAEL A. KATZ
Trans World Airlines, Inc.
100 S. Bedford Road
Mt. Kisco, New York 10549

Attorneys for Respondent

Of Counsel
EDWARD A. BRILL
ANDREW P. MARKS

QUESTION PRESENTED

Whether the Rule 41(b) dismissal of petitioner's claims was justified by the district court's findings of fact, affirmed by the court of appeals as not clearly erroneous, (1) that respondent air carrier did not violate Railway Labor Act § 2, First by failing to bargain with petitioner as required, and (2) that petitioner's strike was not caused or prolonged by any illegal conduct and therefore should not be treated as an "unfair labor practice" strike entitling the strikers to reinstatement upon their unconditional offer to return to work, although they had been permanently replaced.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Authorities	iii
Counterstatement of the Case	1
Counterstatement of the Facts	3
Reasons for Denying the Petition	7
I. The Courts' Application of the Correct Legal Standard to the Particular Facts of This Case Presents No Issue Warranting Review on the RLA Section 2, First Claim	7
II. The Decisions Below that There Was No Unfair Labor Practice Strike Are Based on a Factual Finding of No Causation	12
III. The Decisions Below Do Not Conflict with This Court's Decision in *Price Waterhouse*	15
Conclusion	18

TABLE OF AUTHORITIES

Cases:	PAGE
Burner Sys. Int'l, 273 N.L.R.B. 954 (1984)	13
Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570 (1971)	8, 9
Chicago, R.I. & P.R.R. v. Switchmen's Union, 292 F.2d 61 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962)	9
Emporium Capwell v. Western Addition Community Org., 420 U.S. 50 (1975)	16
Gahr v. Trans World Airlines, No. 1986 CF 3141 (Ill. Dep't of Human Rights 1988)	17
Japan Airlines v. Int'l Ass'n of Machinists, 389 F. Supp. 27 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 46 (2d Cir. 1976)	9
Gagne v. Northwestern National Ins. Co., 50 Fair Empl. Prac. Cas. (BNA) 601 (6th Cir. 1989)	16
Latrobe Steel v. NLRB, 630 F.2d 171 (3d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981)	13
Local 669 v. NLRB, 681 F.2d 11 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1178 (1983)	13
NLRB v. Transportation Management Corp., 462 U.S. 393 (1983)	14, 15
NLRB v. Proler Int'l Corp., 635 F.2d 351 (5th Cir. 1981)	13
NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956)	4
Pacific Fruit Express Joint Protective Bd., Bh'd Ry. Carmen v. Union Pacific, 826 F.2d 920 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2845 (1988)	11
Pan American World Airways v. Int'l Bh'd of Teamsters, 716 F.2d 726 (E.D.N.Y. 1989)	11

PAGE

Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) ..15, 16

Soule Glass & Glazing v. NLRB, 652 F.2d 1055 (1st Cir. 1981)..... 13

Trans World Airlines v. Thurston, 469 U.S. 111 (1985). 17

Virginian Ry. v. System Fed. No. 40, 300 U.S. 515 (1937) 11

Statutes:

National Labor Relations Act
29 U.S.C. §§ 151 *et seq.* .....*passim*

Railway Labor Act
45 U.S.C. §§ 151 *et seq.* .....*passim*

Title VII of the Civil Rights Act of 1964
42 U.S.C. §§ 2000e *et seq.* 3, 15, 16, 17

Rules:

Federal Rules of Civil Procedure
Rule 41(b) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE INDEPENDENT FEDERATION
OF FLIGHT ATTENDANTS,

Petitioner,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

After two years of negotiations with Trans World Airlines, Inc. ("TWA")[1] for a new agreement, mostly under the mediatory supervision of the National Mediation Board ("NMB"), and on the eve of the expiration of the final thirty-day countdown period mandated in the negotiation process required by the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA" or the "Act"), petitioner Independent Federation of Flight Attendants ("IFFA") brought this action. It claimed that TWA had not bargained in accordance with the requirements of Section 2, First of the Act, and sought injunctive relief against prospective implementation by TWA of changed conditions of employ-

1 TWA has no parent company and no affiliates or subsidiaries, other than wholly-owned subsidiaries.

ment. The district court denied a temporary restraining order, but scheduled an early hearing on petitioner's motion for a preliminary injunction.

IFFA, however, then began a strike and TWA implemented changes in work rules and pay scales. Petitioner abandoned its motion for preliminary injunction, assertedly so that it could have the fullest possible hearing on its claim. It also amended its complaint to add the claim that its strike was the equivalent of an "unfair labor practice" strike under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA").

Petitioner had the full trial it sought: thirty-one days of hearings spread over five months, thousands of pages of testimony, thousands of pages of exhibits, hundreds of pages of briefs and proposed findings of fact, and a full day of oral argument on TWA's motion to dismiss under Federal Rule of Civil Procedure 41(b). The district court, having "attentively listened to the evidence and oral arguments . . . comprising some 7,000 pages of transcript and . . . immersed itself in documents and designations from depositions not read into evidence" (A 10),[2] granted TWA's motion, denying IFFA's claim for general reinstatement of the strikers.

The court of appeals summarized the district court's findings as follows:

> The district court's decision contains several key determinations. First, the court held the disparity between the parties' bargaining positions, and not missing or misstated information, was the real barrier to agreement and the sole cause of the strike. In addition, the court ruled that economic considerations, rather than sexual discrimination, were the cause of the bargaining positions TWA took. The court also held TWA did not engage in sham or surface bargaining. Finally, the district court determined TWA's

---

2 "A _____" refers to the appendix to the petition for certiorari in this case; "Pet. _____" refers to the pages of the petition; "S _____" refers to TWA's Supplemental Appendix submitted in opposition to IFFA's appeal from the decision of the district court.

> general bargaining tactics were not in bad faith, and that its poststrike conduct did not prolong the strike.

(A 4; citations omitted)

The district court found, *as facts* (1) that TWA had a passionate desire to reach agreement with IFFA (A 60) (and thus did not violate its bargaining obligation under Section 2, First); (2) that any other violations of the Railway Labor Act which may have occurred, did not cause or prolong the strike (A 28) (and thus that the strike was not an "unfair labor practice" strike);[3] and (3) that sex discrimination was not a motivating factor in determination of the proposals that TWA made (A 65) (and thus that it need not consider whether sex-biased bargaining proposals, even if violative of Title VII, would also constitute a violation of the bargaining duty under the Railway Labor Act). Petitioner says it does not claim that these findings are clearly erroneous. This case is governed by those findings and, therefore, gives rise to no important question of law, novel or otherwise, to engage this Court's attention.

Petitioner says that it "embraces the facts as found by the district court", "as it did in the Court of Appeals". (Pet. 12) In truth, however, petitioner, as it did in the court of appeals, distorts and omits the basic findings in an effort to present novel questions of law to this Court. As the court of appeals recognized, "IFFA's arguments on appeal essentially express its dissatisfaction with the district court's decision to evaluate the evidence in a manner that does not coincide with its own." (A 4)

COUNTERSTATEMENT OF THE FACTS

The district court decision contains an extensive recitation of the background and history of the negotiations between TWA and IFFA. As that court noted, the negotiations encompassed

---

3 In light of this finding, the courts below found it unnecessary to rule on TWA's argument, going to the very essence of the amended claim, that NLRA principles with respect to "unfair labor practice" strikes do not apply to the RLA.

three distinct periods: initial negotiations in 1984-85; negotiation with Carl Icahn as a private investor seeking control of TWA, from June through August 1985; and negotiations with TWA after Icahn gained control, from December 1985 to March 1986.

The negotiations began in February 1984. From the outset, TWA made clear that, in addition to significant salary reductions, it needed comprehensive work rule changes that would result in greater productivity. In June, 1984 TWA supplied IFFA with extensive financial data showing that TWA had suffered an operating loss of $72 million in the first quarter of 1984, placing it "dead last" among major carriers and that its flight attendant costs were the highest in the industry—more than 23% above the industry average for major airlines. IFFA never challenged this information.[4] (A 12-13) TWA's strategy was to expedite the negotiations toward early agreement. In contrast, IFFA's goal was to delay adverse changes, taking advantage of the RLA's requirement that the status quo be maintained throughout the statutory bargaining procedures.

In February 1985, based in part on the expectation of improved economic conditions, TWA decided to "go for a deal" by significantly reducing its proposals. (A 13) TWA reduced its demands by approximately one-half, eliminating its proposal for a 16% wage cut and deleting some 17 proposals for work rule changes. (A 14) Although IFFA recognized, and told its membership, that "TWA wants a contract NOW", it attacked TWA's remaining minimal demands as "outrageous" (S 1409-10a), and asked the NMB to release it from further negotiations in May 1985 so that it could strike during TWA's peak season. The NMB, however, recessed negotiations when TWA became the object of corporate takeover efforts. (A 15-16)

To thwart a pending merger agreement between Frank Lorenzo and TWA, TWA's three major unions, the Air Line

---

4 Thus, TWA did supply IFFA with precisely the type of information dealt with in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), and the other cases cited by IFFA. (Pet. 24)

Pilots Association ("ALPA"), the International Association of Machinists ("IAM") and IFFA, turned to Icahn as a prospective "white knight". Icahn, from the beginning, told the unions that in order to attract lenders for his acquisition, he needed a 20% reduction in overall labor costs and urged a speedy resolution.[5] Belying IFFA's allegations of sex discrimination (the employee groups represented by ALPA and the IAM being predominantly male), Icahn requested an identical 20% reduction in pay and benefits from each union. (A 17) ALPA agreed immediately and was later persuaded to accept a 26% reduction when it appeared that the IAM would not agree to more than a 15% reduction.

Icahn urged IFFA's president, Victoria Frankovich, to attend a meeting over the weekend of August 3 and 4, 1985, at which he hoped to finalize agreements with all three unions—spreading the total concessions he sought among the three unions in such manner as they would agree among themselves—and thus permit him to complete stock purchases assuring him of control of TWA. (A 17-19) Frankovich said she was unavailable, and Icahn agreed to meet with her separately on Friday August 2. Icahn asked IFFA to agree to his original request for a 20% reduction in wages and benefits since his prospective 15% agreement with the IAM was a function of whatever concessions greater than 20% ALPA was willing to give. Frankovich insisted that IFFA would not go beyond the 15% that Icahn expected from the IAM,[6] and arguments turned bit-

---

5 As the district court held, negotiations with Icahn as a potential investor were not subject to the RLA, nor was TWA legally responsible for Icahn's proposals or actions (A 16), even if there had been anything improper in those dealings. Contrary to IFFA's suggestion that its members were "targeted for recoupment of the debt incurred" by Icahn in the takeover (Pet. 12), Icahn's proposals were needed to present a profitable balance sheet to attract investors and accomplish the very acquisition the unions sought.

6 Significantly Frankovich admitted that at the very first meeting with Icahn, IFFA did not insist on parity with the IAM but indicated it would agree to a 5% productivity savings in addition to a 10% wage reduction while the IAM opposed any concession but suggested it could agree to a 10% reduction in exchange for equity. (Trial Tr. 3907)

ter over the question whether IFFA was entitled to parity with the IAM. While no agreement was reached with IFFA, Icahn did reach agreement with the IAM and ALPA over the weekend and completed the purchase of a majority interest in TWA stock on Monday August 5 in reliance on those two agreements.

After contracts with ALPA and IAM had been concluded, and Icahn had acquired control of TWA, the airline's financial condition and prospects, for reasons unrelated to the change of control, radically deteriorated. Responsive to those new conditions, on December 4, 1985, TWA made a new comprehensive proposal to IFFA seeking a 22% reduction in pay and major changes in work rules, essentially seeking to make flight attendant work rules congruent with pilot work rules. (A 31) Although most of the February 1984 work rule proposals originally made by TWA were reintroduced, several were dropped or modified in a manner favorable to IFFA. The district court expressly found that the increase in TWA's demands was fully justified. (A 20) IFFA vehemently opposed TWA's proposals, particularly for work rule changes, erroneously believing that TWA would ultimately drop many of those demands and settle for a total savings of about 20%. (S 563-64)

On the last day of negotiations, the principal move was made by TWA. It reduced its proposal for a pay reduction by 5% to 17%, dropped a proposal that IFFA had identified as a particular obstacle to agreement, and offered a no furlough agreement if IFFA agreed to certain work rule changes. (A 29) Although IFFA ultimately offered a 15% pay reduction, there remained unbridgeable differences regarding major work rule changes resulting in an estimated dollar gap of some $30-40 million. (A 29) Thus, the procedures of the Act having been exhausted, the parties were left to resolve their differences through economic self-help.

REASONS FOR DENYING THE PETITION

Petitioner has selectively chosen a handful of statements from the evidence or from the district court's decision and, through distortion or the elimination of context, reargues the evidence in an effort to have this Court reach different findings from those of the two courts below. Chief among those distortions are IFFA's claims that there is a "direct admission that sex-biased considerations were a substantial motivating factor" for Icahn (Pet. 15), that the court held that Section 2, First of the RLA does not require a carrier to provide relevant information (Pet. 23-26), and that the district court found "many instances of misconduct" by TWA (Pet. 28). In fact, the district court unambiguously stated that "[t]here has been no persuasive showing that sex stereotyping governed or influenced Icahn's economic demands" (A 65), and that "the legal duty to supply information is [not] a dead letter" and "the doors of the courthouse remain[ed] open" to IFFA's claims concerning TWA's refusal to supply information (A 50); it made no finding whatever concerning the unspecified "many instances of misconduct" but concluded that, assuming *arguendo* the "various claims of misconduct in bargaining by TWA prior to the strike" occurred, they were not the cause of the strike (A 28). In short, the facts found do not permit formulation, much less require resolution, of the "Questions Presented" by petitioner.

I. THE COURTS' APPLICATION OF THE CORRECT LEGAL STANDARD TO THE PARTICULAR FACTS OF THIS CASE PRESENTS NO ISSUE WARRANTING REVIEW ON THE RLA SECTION 2, FIRST CLAIM

The district court found that TWA was " 'passionately' eager to make . . . an agreement with IFFA" and that "[s]hort of making his proposals more palatable . . . there was little more that Icahn could have done to demonstrate his desire for a contract." (A 60) Furthermore, the court found that TWA's demands were "honestly advanced to meet perceived needs" (A 33), and were neither "so grossly excessive that they exceeded

the wide range of reasonableness" (A 30) nor "governed or influenced" by "sex stereotyping" (A 65). Finally, the court found the evidence clear that TWA was not engaged in "sham or surface bargaining." (A 32) Based on these findings, the conclusion that TWA did not violate RLA § 2, First is entirely unremarkable and consistent with every other decision regarding alleged bad faith bargaining under the Railway Labor Act.[7]

The district court recognized that *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570 (1971), is "[t]he case which opens the courthouse door here." (A 36) There, a majority of this Court held that the duty, under RLA § 2, First, to exert every reasonable effort to make agreements was judicially enforceable, at least to the extent that it prohibits a party from going "through the motions with 'a desire not to reach an agreement' ". 402 U.S. at 578 (citation omitted). The Court, however, stated "two caveats": "First, parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes"; and "[s]econd, great circumspection should be used

---

7 IFFA's claims that the district court failed to consider the "totality of conduct in assessing the question of requisite intent" (Pet. 29) and "rejected IFFA's claim of surface bargaining on an analysis of TWA's proposals" (Pet. 30), ignore the unprecedented, lengthy and meticulous examination in depth which the district court gave to the two years of negotiations. The court expressly considered alleged violations barred by the statute of limitations because they might have "probative value" (A 43), considered IFFA's negotiations with Icahn as a private investor because they might be important "in appraising the renewed sessions . . . after Icahn became the controlling stockholder in TWA" (A 16) and considered TWA's post-strike conduct because "it may have a bearing on the question of TWA's prior good faith bargaining" (A 34). It was precisely because the court *did* consider the "totality of conduct," including the "three best prospects for settlement" that IFFA had, and spurned, that it was able "confident[ly]" (A 50) to identify the cause of the strike as IFFA's refusal to accede to work rule changes, and not be misled by red herring contentions such as sex discrimination or the failure to produce estimates of projected savings. IFFA's claims simply reflect its disagreement with the court's assessment of the totality of the conduct.

in going beyond cases involving 'desire not to reach agreement,' for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." 402 U.S. at 579 n.11.[8] Synthesizing virtually every other case considering the Section 2, First obligation (A 37-41), the district court concluded that "the general procedural standards for surveillance of bargaining under the RLA have been generally equated with those under the NLRA, with emphasis, however, on the precautions announced in *C&NW.*"[9] (A 40)

There is no basis for IFFA's claim that the lower courts interpreted the RLA as imposing a "lesser obligation" to reach an agreement than required by the NLRA[10]. (Pet. 21) The district

---

8 Four members of the Court, in a dissenting opinion by Justice Brennan, concluded that the RLA "excludes any role for the judiciary to oversee the relative efforts of the parties in their mutual attempt to reach settlement." 402 U.S. at 599.

9 This holding does not conflict with the decisions of the Second Circuit cited by petitioner. In *Chicago, R.I. & P.R.R. v. Switchmen's Union*, 292 F.2d 61 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962), decided before *Chicago & N.W. Ry.*, the court simply assumed, without analysis, that the RLA imposes a somewhat greater duty to endeavor to reach agreement than the NLRA. Nonetheless, finding "nothing in [the bargaining] history to show the Union simply went through the motions of bargaining" and nothing in the Act requiring a party to accept a proposal or make a concession (*id* at 70), the court reversed an order enjoining the Union from striking. Although the assumption was repeated by a district court in *Japan Airlines v. Int'l Ass'n of Machinists*, 389 F. Supp. 27, 34 (S.D.N.Y. 1975), *aff'd on other grounds*, 538 F.2d 46 (2d Cir. 1976), that court also held that the ultimate question is "whether the party charged with violation of its duty has merely gone through the motions of compliance . . . without a desire to reach an agreement." The "desire to reach agreement" standard comes directly from this Court's decision in *Chicago & N.W. Ry.* and was the precise inquiry made by the court below. It would be hard to conceive of a greater duty than to be "passionately eager" to reach agreement.

10 IFFA also contends that the decisions below subject RLA bargaining to "lesser scrutiny" than NLRA negotiations. (Pet. 22) The district

court found not only that TWA was " 'passionately' eager" to reach an agreement, but that "Icahn's personal conduct . . . shows a purpose to achieve agreement . . . ." (A 50 n.14) The evidence did "not permit a conclusion that Icahn sought a strike or was unwilling to negotiate" (A 32) and fell "considerably short of supporting a conclusion that Icahn planned [a strike], hoped for such a result or happily saw his hopes realized on March 6 and 7, 1986" (A 33-34). Nor were the hallmarks of bad faith bargaining under the NLRA present in this case: TWA did not have a "take it or leave it" stance; it did not refuse to modify its proposals or consider IFFA's counterproposals; did not denigrate IFFA's status as bargaining representative; did not insist upon contractual provisions giving it unilateral control over working conditions or depriving the Union of its ability to represent employees; did not cancel bargaining sessions or otherwise refuse to confer with IFFA[11]; and did not press nonmandatory subjects of bargaining to impasse. On those facts and findings, no conclusion of bad faith bargaining would be drawn under the NLRA.

IFFA asserts that in addition to "surface bargaining" (which the court here held was prohibited but found was not proved), the NLRA prohibits *per se* violations, defined by IFFA as

---

court noted that "[a] requirement of 'blow-by-blow' fact-finding, as sometimes mandated in NLRA cases" (Pet. A 40 n.10) is not appropriate under the RLA, but nevertheless allowed IFFA to present a blow-by-blow account of the entire course of negotiations. Any scrutiny under the RLA occurs against the background of the differences in the two statutory schemes including the typically longer duration of RLA negotiations, the RLA's requirement of mandatory mediation under the supervision of the NMB, and Congress' deliberate failure to provide a specialized tribunal, equivalent to the NLRB, to adjudicate claims of improper bargaining. (A 57)

11 IFFA's claim that the decisions below establish a legal principle contrary to the Court's decision in *Virginian Ry. v. System Fed. No. 40*, 300 U.S. 515 (1937), (Pet. 27) is without merit. TWA did not bargain with ALPA as the representative of flight attendants, and, as the court found, the Icahn-ALPA agreement was not a "rigid agreement" which prevented TWA from agreeing with IFFA to more or less than the target figure. (A 51)

"refusals to bargain *in fact* which, considered alone and irrespective of other bargaining conduct are inherently destructive of the bargaining process" (Pet. 22; emphasis in original) and that the district court concluded "that there is no such thing as a *per se* violation of § 2, First" (Pet. 23). The only "*per se* violation" of the NLRA duty to bargain IFFA identifies is "a refusal to provide relevant information." (Pet. 24) But the district court here *did* find an obligation in the RLA to supply information and that a refusal to do so could be a violation of that Act. (A 45 n.11) Such an obligation, if it exists, can only flow from Section 2, First.[12]

The "information" IFFA sought was, for the most part, TWA's estimates of the savings to be achieved by each proposal. The district court found, however, that "[b]asic financial estimates regarding the TWA proposals have generally been supplied."[13] (A 25) With minor exception, TWA gave IFFA all

---

12 In finding that any failure by TWA to give information was not a cause of the strike, the district court expressed its disinclination to rely solely on the Ninth Circuit's holding in *Pacific Fruit Express Joint Protective Bd., Bh'd Ry. Carmen v. Union Pacific*, 826 F.2d 920 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2845 (1988), that there is no obligation under the RLA to produce relevant information at the request of the bargaining representative. The analysis employed by the court in *Pacific Fruit* is applicable to negotiation as well as arbitration. *See Pan American World Airways v. Int'l Bh'd of Teamsters*, 716 F. Supp. 726 (E.D.N.Y. 1989). Indeed, the Question Presented by the petition for certiorari in *Pacific Fruit* was "[w]hether § 2, First of the Railway Labor Act . . . imposes a statutory duty upon a carrier to furnish to the union, upon request, information needed by the union to fulfill its statutory role as exclusive collective bargaining agent under the Railway Labor Act." (Petition for Certiorari in No. 87-1525).

13 IFFA does not claim that it was denied hard information such as the actual cost of existing wages and work rules, comparisons with other airlines, hours worked, and the like, nor did it dispute the accuracy of that information. Indeed, the data supplied by TWA was confirmed by IFFA's own consultant. (A 13) TWA had been reluctant in the early stages of negotiation to give detailed savings projections for each proposal because such calculations are necessarily speculative and in the

the estimates it had regarding its December 1985 proposals by December 4. IFFA never pursued any questions concerning those estimates until eight weeks later, after it learned release by the NMB was imminent.

Any doubt that "the issue of missing information was not the real impediment to agreement" (A 26) was dispelled by the advice of IFFA's counsel to TWA's chief negotiator in a private meeting in January 1986 not to be "concerned about the numbers", *i.e.*, the estimated savings details (A 25-26). The court's findings make clear that, in view of IFFA's adamant refusal even to consider the major work rule changes TWA wanted, it was not useful or relevant to the prospects for an agreement to furnish savings estimates of the subparts of those proposals (which, in any event, TWA did not have). Thus, the court found, "[n]o information sought from TWA could likely result in flight attendants accepting the work rules concessions that would have filled the chasm between TWA's evaluation of IFFA's best offer . . . and the minimum sought by Icahn." (A 27)

II. THE DECISIONS BELOW THAT THERE WAS NO UNFAIR LABOR PRACTICE STRIKE ARE BASED ON A FACTUAL FINDING OF NO CAUSATION

The main thrust of IFFA's complaint, and what it tried to prove at trial, was that unlawful conduct by TWA caused or prolonged the strike so that striking flight attendants, by analogy to NLRA concepts, could be considered "unfair labor practice" strikers with a right to reinstatement upon their unconditional offer to return to work. Accepting NLRA norms for purposes of decision, the court determined that the strike was neither caused nor prolonged by any unlawful conduct by

---

past such an exercise had led to time-wasting arguments over the savings from proposals IFFA had adamantly refused even to consider. IFFA's argument, by taking statements from the district court's decision out of context, makes it appear that this reluctance continued through the third stage of negotiation, when the court found that it did not.

TWA. The "sole cause of the impasse was the wide divergence between the demands of TWA (Icahn) and the more modest concessions proposed by IFFA." (A 28-29) "[N]o informational disclosures . . . could have materially affected the negotiations, if known earlier." (A 27) "The various claims of misconduct in bargaining by TWA prior to the strike . . . fall short . . . of even plausibly being a cause of the impasse." (A 28) "IFFA does not suggest any date for any unlawful event that so antagonized the strikers as to convert what was hypothetically an economic strike into a more protected strike." (A 34)

It is well settled that, under the NLRA, "[t]he mere fact that an unfair labor practice is committed prior to the strike does not necessarily render that strike an unfair labor practice strike." *Latrobe Steel v. NLRB*, 630 F.2d 171, 181 (3d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981). To be an unfair labor practice strike, "[t]here must be evidence of a causal link between the unfair labor practice and the strike." *NLRB v. Proler Int'l Corp.*, 635 F.2d 351, 354 (5th Cir. 1981). "Mere awareness of unfair labor practices is insufficient to establish this causal connection." *Local 669 v. NLRB*, 681 F.2d 11, 20 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1178 (1983). The NLRB's general counsel must establish that unlawful conduct occurred *and* that it caused the strike. *See Soule Glass & Glazing v. NLRB*, 652 F.2d 1055, 1100 (1st Cir. 1981).

None of the cases cited by IFFA suggest that if there is a refusal to provide information, any strike that follows is *per se* an unfair labor practice strike. The law is clearly to the contrary. *Soule Glass & Glazing v. NLRB*, 652 F.2d 1055, 1100 (1st Cir. 1981); *Latrobe Steel v. NLRB*, 630 F.2d 171 (3d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981); *Burner Sys. Int'l*, 273 N.L.R.B. 954 (1984).[14]

---

14 The court held that the strike was not an "unfair labor practice strike" because "[l]ack of information did not trigger or unleash the strike" (A 49) and was not a cause of the impasse (A 28). On the evidence, this conclusion was inescapable. In an 89-page memorandum written to set the guidelines for the Union's course in negotiations, IFFA's counsel set forth a blueprint for IFFA's bargaining strategy of delay, including extensive questioning as to each of TWA's proposals,

The district court meticulously examined the record for evidence that conduct equivalent to an unfair labor practice was *a factor* in causing or prolonging the strike. (A 44) While accepting IFFA's claim that certain alleged conduct could violate the RLA (A 34, 45 n.11), the court found that no such conduct by TWA either caused or prolonged IFFA's strike. Where, as here, the determination of lack of causation is not clearly erroneous and the decision has no impact beyond the litigants, there is no reason to grant certiorari.

IFFA does not address the finding that no improper conduct caused or prolonged the strike. Instead, it relegates to the final footnote of its petition its argument that no lawful impasse can occur "when the deadlock is caused, as obviously the case herein, by one party's bad faith bargaining"[15] (Pet. 29 n.22) and maintains that TWA had the burden of proving that the strike was an economic one as an affirmative defense under the type of mixed-motive analysis approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). That argument, of course, ignores the central finding that TWA did not bargain in bad faith. (A 54) As petitioner acknowledges, under

---

and noted that at some point IFFA might be in a position to file a lawsuit to compel TWA to produce information. (A 11) Pursuant to this strategy, when IFFA sought release from negotiations in May 1985, it simultaneously sent TWA a lengthy request for detailed estimates of anticipated savings from TWA's February 1985 proposals. The district court found that "one major motivation for the blanket request seems to have been the creation of a record for possible litigation . . . ." (A 16) This same strategy was clearly behind IFFA's request, dated January 30, 1986, for detailed estimated savings "information" on each of TWA's December 1985 proposals, separately presented by subpart, with explanations of all calculations made in valuing the proposal. That request was not made until IFFA learned that release by the NMB was imminent. Significantly, no lawsuit has ever been brought to compel TWA to produce information. As the district court noted, "[s]imply collecting a series of unanswered questions over a two-year period of negotiations will not suffice to establish the existence of an unfair labor practice strike." (A 51)

15 Under the RLA, the right to engage in self-help is not based on the concept of "impasse" but on release by the NMB.

Transportation Management, the employer bears the burden to show that it would have acted in the same manner for wholly legitimate reasons *only after* adverse action has been shown to have been based in part on improper conduct[16] (Pet. 28), a showing IFFA was unable to make.

III. THE DECISIONS BELOW DO NOT CONFLICT WITH THIS COURT'S DECISION IN *PRICE WATERHOUSE*

The district court found that "[t]here has been no persuasive showing that sex stereotyping governed *or influenced* Icahn's economic demands . . . ."[17] (A 65; emphasis added) Thus the decisions below in no way conflict with *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), even if the teaching of that case, with respect to individual employment discrimination under Title VII, could be read as having any bearing on bargaining obligations under the RLA.

In *Price Waterhouse*, this Court approved a "mixed-motive" analysis for use in those Title VII cases where the plaintiff has demonstrated that sex was a motivating factor in an adverse employment decision. The plurality and concurring opinions hold that a defendant bears the burden of proving that it would have made the same decision absent a discriminatory motive

---

16 In the district court's view, if unlawful conduct had played any part in triggering or prolonging the strike, apparently it would have been an unfair labor practice strike (A 44), whether or not the strike would have occurred anyway. Clearly then, the court found no proof of the "true causation" which was required "before what appears to be an economic strike should be reclassified as an unfair labor practice strike." (A 45; footnote omitted)

17 IFFA's repeated assertions that TWA or Icahn was "shown to have based adverse action on invidious stereotype perception" (Pet. 14), "admi[tted] that sex-biased considerations were a substantial motivating factor" (Pet. 15), "admitted discriminatory *animus*" (Pet. 16), admitted "acting (at least in part) on the basis of such an invidious perception" (Pet. 16), and was "shown to have been acting at least in part due to a discriminatory *animus*" (Pet. 17), are completely contrary to the court's findings that sex discrimination was not a motivating factor.

only if the plaintiff first "satisf[ies] the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision . . . ." *Id.* at 1798 n.12. In the instant case, IFFA did not satisfy the district court that gender played *any* part in the proposals that TWA (or Icahn) made.[18]

Nothing in *Price Waterhouse* suggests that a mixed-motive case is made out whenever a plaintiff points to a gender-based statement. To the contrary, the plurality expressly rejected such a contention, stating that "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision." 109 S. Ct. at 1791. See *Gagne v. Northwestern National Ins. Co.*, 50 Fair Empl. Prac. Cas. (BNA) 601, 605 (6th Cir. 1989) (supervisor's statement that he "needed younger blood" "was clearly insufficient to invoke the application of the recently enunciated *Price Waterhouse* standard"). Caution in attributing motivation is particularly necessary where, as here, the statement relied upon was made during collective bargaining because, in an effort to persuade, a party will often take positions and make arguments that do not reflect its true motivation.

IFFA's contention that the decisions below upset the harmony between Title VII and the federal labor laws (Pet. 18-19) is premised on an impermissible garbling of employment discrimination and collective bargaining standards. A finding of a violation of Title VII does not compel a finding of a violation of Section 2, First. As this Court noted in *Emporium Capwell v. Western Addition Community Org.*, 420 U.S. 50, 73 (1975), "[i]n order to hold that employer conduct violates § 8(a)(1) of

---

18 Contrary to IFFA's argument, the alleged "breadwinner" statement was not a factor at a "*moment of decision*" (Pet. 16; emphasis in original), apart from the invalidity of the notion of a decisive moment in a course of collective bargaining over two years. As the court found, the statement "was a . . . rationalization, having no probable relationship with Icahn's true rationale. . . ." (A 66) At the time of those remarks in August 1985, moreover, Icahn was not even seeking any of the work rule changes—originally proposed by TWA in February 1984—that were the central issue in the strike that began in March 1986.

the NLRA *because* it violates § 704(a) of Title VII, we would have to override a host of consciously made decisions well within the exclusive competence of the Legislature." In any event, this case does not present that question. Since the district court found that discrimination was not a motive of TWA's proposals, it had no occasion to decide the extent of collectively represented employees' "protection against invidious sex-motivated employment conditions" (Pet. 19) and the decision cannot be read as "immunizing [airlines] from a finding of employment discrimination"[19] (Pet. 19).

IFFA suggests to this Court, without authority or factual support, that TWA engaged in improper bargaining based on disparate treatment of employees in different bargaining units. IFFA's comparison of flight attendants with IAM-represented employees is an attempt to prove its members' comparable worth to the IAM's, not to show that similarly situated employees in the same bargaining unit were treated disparately because of their sex. Moreover, IFFA's comparable worth theory of sex discrimination is disproved by comparison to the predominantly male pilots who incurred a larger wage cut, in both absolute dollar and percentage value than TWA's March 6, 1986 offer to IFFA of a 17% cut (A 29), while working under similar work rules to those offered to, but rejected by, IFFA.

---

19 Petitioner does not, indeed cannot, support its argument that the employment discrimination laws are incapable of protecting collectively represented employees from discrimination. (Pet. 18 n.17) Federal courts do not allow the RLA bargaining process to override proved discrimination. *See TWA v. Thurston*, 469 U.S. 111 (1985). IFFA omits to mention, moreover, that it has in fact pursued its discrimination claim, but the EEOC, like the courts below, found:

> The preponderance of the evidence indicates [TWA's] decision was based on economic considerations of profitability and competitiveness, and on the results of its negotiations with the three bargaining agents for its employees rather than on the sex of the memberships of the various bargaining units.

(S 30) Similar findings were made by the Illinois Department of Human Rights (*Gahr et al.* v. *TWA*, No. 1986 CF 3141 (July 22, 1988)). An action by IFFA alleging violation of Title VII and the ADEA is pending in the district court. (*Miller v. TWA*, No. 87-6063-CV-SJ-6 (W.D. Mo. 1987)).

Conclusion

There is no compelling issue of national labor policy here and no conflict between the circuits. This is simply a case in which the facts have been found against petitioner and nothing is presented to warrant review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

MURRAY GARTNER
PAUL E. DONNELLY
MARK A. BUCKSTEIN
MICHAEL A. KATZ

EDWARD A. BRILL
ANDREW P. MARKS
Of Counsel

December 15, 1989